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In The

Supreme Court of the United States

October Term, 1988

C. WILLIAM VERITY, JR., Secretary of Commerce, et al.,

Petitioners,

v.

CENTER FOR ENVIRONMENTAL EDUCATION, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF BY RESPONDENTS KOKECHIK FISHERMEN'S ASSOCIATION AND QALUYAAT FISHERMEN'S ASSOCIATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals correctly determined that the Marine Mammal Protection Act prohibits the Secretary of Commerce from issuing the Federation of Japan Salmon Fisheries Cooperative Association a general permit authorizing its members to set gillnets in the North Pacific Ocean portion of the United States 200-mile fishery conservation zone when, based upon uncontroverted evidence in the administrative record, the Secretary knows that, if he permits them to be set, the gillnets will entangle and drown fur seals, sea lions, Pacific white-sided dolphin, harbor porpoise, killer whale and other marine mammals in violation of the moratorium on taking set forth in the Act?

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STATEMENT

This case presents a simple question of statutory construction in a complex factual context.

Each spring millions of salmon fry hatch in the gravel of Alaska spawning streams, and then move down and out the mouth of their rivers of origin into the North Pacific Ocean where they spend two to six years before migrating home. Aware of this fact, as early as 1930 Japanese fishermen began fishing for Alaska salmon in the North Pacific Ocean with floating gillnets. *See generally* 98 Cong. Rec. A2987-89 (1952)(remarks of Rep. Tollefson *reprinting* Edward Allen, *The North Pacific Fisheries Treaty – Friendly Settlement of a 20-year Dispute*).

To stop the interceptions, in 1937 the Secretary of State negotiated an agreement with the Government of Japan (GOJ) pursuant to which GOJ agreed to prevent its nationals from gillnetting Alaska salmon. *Id.* However, independent of the agreement, the Second World War kept the Japanese fleet in port.

After the war, in 1952 the United States, Canada and GOJ entered into the International Convention for the High Seas Fisheries of the North Pacific Ocean, May 9, 1952, United States-Canada-Japan, 4 U.S.T. 380, T.I.A.S. No. 2786 (INPFC). As part of the INPFC, GOJ agreed that its nationals would not fish in the North Pacific Ocean east of 175° west longitude, the so-called "abstention line," west of which Alaska salmon were not thought to congregate. Although biologists soon determined that significant numbers of Alaska salmon were present west of the line, despite repeated requests by the United States that it do so, GOJ refused to renegotiate the INPFC. *See* 111 Cong. Rec. 12,698 (1965)(remarks of Senator Bartlett).

In 1972 Congress enacted the Marine Mammal Protection Act (MMPA). Pub. L. No. 92-522, 86 Stat. 1027 (codified as amended at 16 U.S.C. § 1361 *et seq.*).

Except to the extent authorized by statute or permit, § 101(a) of the MMPA, 16 U.S.C. § 1371(a), imposed a moratorium, i.e., "a complete cession," on all activities that would result in the taking of marine mammals, including takings that occur when marine mammals are entangled and drowned in gillnets. Although § 101(a) exempted commercial fishermen from compliance with the moratorium for two years, beginning in 1974 the MMPA required fishermen whose nets entangle and drown marine mammals to either obtain a permit authorizing them to do so or stop fishing.

Although the United States knew that gillnets set in the North Pacific Ocean by Japanese vessels fishing for salmon pursuant to the INPFC were entangling and drowning significant numbers of marine mammals, since MMPA jurisdiction stopped a few miles offshore, the Japanese fleet was not required to comply with the MMPA.

In 1976 the jurisdictional situation changed when Congress enacted the Magnuson Fishery Conservation and Management Act (MFCMA). Pub. L. No. 94-265, 90 Stat. 331 (codified as amended at 16 U.S.C. § 1801 *et seq.*). Section 102 of the MFCMA, 16 U.S.C. § 1812, asserted United States jurisdiction over fish inside a 200-mile fishery conservation zone (FCZ) surrounding the coastline of the United States. To conform MMPA jurisdiction over marine mammals to the jurisdiction the MFCMA asserted over fish, § 404 of the MFCMA, 16 U.S.C. § 1362 note, amended § 3 of the MMPA, 16 U.S.C. § 1362, to expand the definition of "waters under the jurisdiction of the United States" to include the FCZ. In the North Pacific Ocean the practical effect of the amendment was to subject Japanese vessels setting gillnets inside the FCZ to the moratorium on entangling and drowning marine mammals.

With respect to salmon fishing, the MFCMA created a legal anomaly. Section 201 of the MFCMA, 16 U.S.C. § 1821, limited foreign fishing for a fish stock to that portion of the optimum yield of the stock that would not be harvested by United States fishermen. Since United States fishermen were capable of harvesting the entire optimum yield of Alaska salmon stocks, by implication, the § 201 prohibited foreign fishing for salmon. However, the INPFC authorized Japanese vessels to gillnet millions of Alaska salmon inside the FCZ.

To resolve the conflict, § 202 of the MFCMA, 16 U.S.C. § 1822, instructed the Secretary of State to renegotiate the INPFC. As a result, in 1978 the United States, Canada and GOJ negotiated a treaty that superseded the MFCMA. The treaty authorized Japanese vessels to set gillnets inside the FCZ between June 10 and July 31 to catch Alaska and Soviet[1] salmon. Protocol Amending the International Convention for the High Seas Fisheries of the North Pacific Ocean, April 25, 1978, United States-Canada-Japan, 30 U.S.T. 1095, T.I.A.S. No. 9242.

The new treaty also contained a provision regarding compliance with the MMPA. As a result of the MFCMA amendment to the MMPA definition of the term "waters of the United States," the MMPA now prohibited Japanese vessels from setting gillnets inside the FCZ unless the vessels first acquired certificates of inclusion issued

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[1] Salmon of Alaska and Soviet origin commingle in the North Pacific Ocean. Ironically, each spring GOJ negotiates a fishery agreement with the Soviet Union in which the Soviets establish a quota on the number of salmon Japanese vessels may catch by species. While the United States, through the INPFC, allows Japanese vessels to fish inside the FCZ without cost, in addition to imposing quotas, the Soviet Union charges GOJ a multimillion dollar fee for the privilege of catching Alaska and Soviet salmon inside the United States FCZ.

pursuant to permits issued pursuant to § 104 of the MMPA, 16 U.S.C. § 1374.

Aware of the situation, GOJ negotiated a three-year exemption. In pertinent part, § 1(c) of the annex to the text of the 1978 version of the INPFC states:

> The requirement of the Government of the United States that Japanese fishing vessels engaged in this fishery have on board a Certificate of Inclusion relating to the incidental taking of marine mammals shall be suspended for the period ending June 9, 1981 during which period the Governments of Japan and the United States shall conduct joint research, shall cooperate to determine the effect of the Japanese salmon fishery on marine mammal populations, and shall work to reduce or eliminate the incidental catch of marine mammals in the fishery.

30 U.S.T. at 1111-12.

Shortly thereafter, Congress implemented the bargain GOJ had struck by amending the North Pacific Fisheries Act to exempt Japanese vessels from compliance with the MMPA until June 10, 1981. Pub. L. No. 95-326, 92 Stat. 399, 405 (1978). However, to ensure that GOJ and its nationals did not misconstrue Congress's intent, the amendment announced that: "After June 9, 1981, the taking of marine mammals incidental to fishing operations by Japanese vessels within the fishery conservation zone shall be regulated pursuant to the Marine Mammal Protection Act of 1972." *Id.*

Pursuant to § 104 of the MMPA, on January 19, 1981, the Federation of Japan Salmon Fisheries Cooperative Association (Federation)[2] submitted an application

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[2] The Federation is an umbrella organization whose membership includes the owners and operators of mothership processing vessels and catcherboats that fish for salmon in the North Pacific Ocean pursuant to the INPFC.

to the Secretary of Commerce (Secretary) that requested a permit authorizing its catcherboats' gillnets to take Dall's porpoise, fur seals, sea lions, harbor porpoise, Pacific white-sided dolphin and killer whales. 46 Fed. Reg. 10,785-88 (1981). After considering available data, the Secretary denied the application as to harbor porpoise, Pacific white-sided dolphin and killer whales. *Id.* However, after an administrative hearing, the Secretary issued the Federation a three-year permit to entangle and drown Dall's porpoise, fur seals and sea lions. 46 Fed. Reg. 27,056-68 (1981). The permit enabled Federation catcherboats to obtain certificates of inclusion that GOJ, through its agreement to the text of the annex to the 1978 protocol, had previously acknowledged were a condition precedent to fishing inside the FCZ.

At the Federation's request, in 1982 Congress amended the North Pacific Fisheries Act to extend the permit to June 10, 1987. Fisheries Amendments of 1982, Pub. L. No. 97-389, § 201, 96 Stat. 1949-50 (codified at 16 U.S.C. § 1034(b)).

On July 18, 1986, the Federation filed an application for a new permit. The application requested permission to annually take 5,500 Dall's porpoise, 450 fur seals and 25 sea lions. On December 1 through 7, 1986, an administrative law judge held a hearing on the application. In addition to the Federation and the Secretary, the Kokechik and Qaluyaat Fishermen's Associations (Kokechik) and a consortium of environmental organizations (CEE) participated as parties in the proceeding. On March 6, 1987, the judge recommended that the Secretary issue the Federation a permit authorizing its catcherboats to annually take 1,750 Dall's porpoise and 45 fur seals, with an annual five percent reduction in the porpoise

quota. On May 14, 1987, the Under Secretary of Commerce published a final decision which announced that the Secretary intended to issue the Federation a three-year permit authorizing its catcherboats to take a total of 6,039 Dall's porpoise. 52 Fed. Reg. 19,874-80 (1987).

Significantly, the decision indicated that the permit would not authorize Federation catcherboats to entangle and drown fur seals, sea lions, harbor porpoise, Pacific white-sided dolphin or killer whales, even though uncontroverted evidence presented during the hearing indicated that if the Secretary allowed Federation catcherboats to set gillnets inside the FCZ the nets would unlawfully entangle and drown the aforementioned species. Horoshi Ogiwara, an experienced Federation fleet commander, testified as follows:

MITCHELL: If for some reason the Federation should not be granted a permit to take Dall's porpoise, in your judgment as a mothership commander is there any way that your catcherboats could operate without taking Dall's porpoise to some extent?

OGIWARA: I think it is almost impossible.

MITCHELL: If for some reason the Federation were not granted a permit to take fur seals, is there anything that you could instruct your catcherboat captains to do to change the way they fish that could guarantee to the United States government that zero fur seals would be taken?

OGIWARA: As I stated before, it is extremely difficult to totally eliminate the incidental take. Therefore, in that event, it may be we can't continue the operation any longer.

MITCHELL: I don't want to be redundant, but this is important. Does that mean the

answer is that there is no way that you could guarantee to the United States government that your catcher-boats would not catch fur seals? Is that correct, yes or no?

OGIWARA: Well, if we are required that we can't take any animals then we can't continue the operation.

MITCHELL: And would that also be true if the animals that you had to guarantee that you absolutely would not take were sea lions?

OGIWARA: Well according to our experience, since 1981 the record indicates that only one sea lion was caught in one season. However, the sea lion is there in the waters where we are operating so that no matter how small that number is, as is indicated by the record, if there is one animal taken, then again we can't say that we will never take any animals.

Administrative Hearing Transcript at 501-02.

Dr. Linda Jones, the manager of the cetacean research program at the National Marine Mammal Laboratory and the Secretary's most knowledgeable witness on the subject, substantiated Captain Ogiwara's testimony:

MITCHELL: Having been on research vessels in the vicinity of the fishery do you believe that there is any way that a catcher-boat could knowingly avoid taking a harbor porpoise if it were in the general vicinity of where harbor porpoises are known to be?

JONES: No. It's a passive gill net.

Id. at 933.

In response to the final decision, the Federation, Kokechik and CEE filed petitions for review in the United States District Court for the District of Columbia, and

Kokechik filed a motion for a preliminary injunction. On June 15, 1987, the court granted Kokechik's motion and enjoined the Secretary from issuing the permit. *Federation of Japan Salmon Fisheries Cooperative Ass'n v. Baldrige*, 679 F. Supp. 37 (D.D.C. 1987). In so holding, the court first noted that:

> [T]he Secretary has interpreted the MMPA so as to allow him to issue a permit to the Federation to take one species of mammal, Dall's porpoise, for which the required finding of no disadvantage based on optimum sustainable population has been made, even though the Secretary knows other species will also be taken and as to those other species no such finding has been made.

Id. at 46.

The court then determined that the Secretary's interpretation of the MMPA contravened the express intent of Congress. According to the court:

> The MMPA imposes an absolute moratorium on all takings of marine mammals. The only way this moratorium may lawfully be ignored is through explicit Congressional action, as has been done for the Federation twice in the past, or by meeting the burden of proof necessary to allow the agency to find that a single taking will not disadvantage a particular stock because that stock is within the range of its optimum sustainable population. For the Secretary to issue a permit for only the Dall's porpoise, when it is clear that other marine mammals are certain to be taken yet no permit was issued for such mammals because a finding could not be or was not made, appears, at this juncture, clearly contrary to the MMPA.

Id. at 47.

On February 16, 1988, the United States Court of Appeals for the District of Columbia Circuit affirmed. *Kokechik Fishermen's Ass'n v. Secretary of Commerce*, 839 F.2d 795 (D.C. Cir. 1988). In so holding, the court explained its reasoning as follows:

> The MMPA effects a moratorium on the taking of marine mammals. Congress decided to undertake this decisive action because it was greatly concerned about the maintenance of healthy populations of all species of marine mammals within the the ecosystems they inhabit. Exceptions tc this moratorium clearly evidence a concern with the relationship between the activity engaged in and its effect on marine mammals and their ecosystem. It is the duty of the Secretary to take a systematic view of an activity's effect on marine mammals. A view that the permit process functions merely to determine which takes will be exempted from civil penalties is inconsistent with this duty because it allows – subject to the civil penalty price – illegal takings of other protected marine mammals. The Secretary has no authority, by regulation or other action, to issue a permit that allows conduct prohibited by that Act. Nonetheless, the Secretary chose to disregard these incidental takings [of fur seals, sea lions, harbor porpoise, northern right whole dolphin and Pacific white-sided dolphin] as "negligible," an undefined and ambiguous standard at best. The MMPA, however, does not provide for a "negligible impact" exception to its permitting requirements where incidental takings are not merely a remote possibility but a certainty.

Id. at 801-02.

With three dissenting votes, the circuit court denied petitions for rehearing *en banc*. And on June 9, 1988, this Court denied motions for a stay. As a result, Federation catcherboats did not set gillnets inside the FCZ during the 1988 fishing season.

REASONS THE PETITION SHOULD BE DENIED

1. The Circuit Court Correctly Interpreted the Intent of Congress.

Whether this Court should review the circuit court opinion is a matter of judicial discretion that should only

be exercised "when there are special and important reasons therefor." United States Supreme Court Rule 17. Although the subject matter is novel and the outcome of importance to the parties, this is not a special case. As the circuit court noted at the outset of its opinion, this action presents "a question of pure statutory interpretation." *Kokechik, supra* at 797. Questions of statutory construction are not unique. Each year the circuit courts routinely interpret the intent of Congress embodied in hundreds of statutes, and this case is no exception to the rule.

The Secretary argues to the contrary by asserting that the circuit court "departed from this Court's teachings in *Chevron U.S.A. Inc. v. N.R.D.C.*, 467 U.S. 837, 843 (1984)." Petition for Writ of Certiorari at 11. But contrary to the Secretary's protestation, the circuit court opinion is consistent with *Chevron*.

Chevron holds that if the text of a statute indicates that the intent of Congress is clear with respect to the subject at issue between the parties "that is the end of the matter; for the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. If it is, an agency may not implement the statute in a manner different than Congress intended, even if implementing Congress's intent may produce a result the agency believes is bad policy, ill-conceived, wrong or plain stupid. As Chief Justice Rehnquist has observed: "[An agency] may not choose not to enforce laws of which it does not approve, or to ignore statutory standards in carrying out its regulatory functions." *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual*, 463 U.S. 29, 59 n. * (1983) (Rehnquist, J., concurring in part and dissenting in part).

In the instant action, after reading the text of the statute, three of the four judges who considered the question have concluded that Congress intended the MMPA to mean what it says, i.e., that the Act imposes "a complete cession" on the taking of *all* marine mammals and the Secretary may not permit activities to occur that he knows will result in the unlawful taking of marine mammals, even if the number of animals taken unlawfully is small.[3]

As Captain Ogiwara and Dr. Jones testified, if the Federation is issued a permit to take Dall's porpoise and

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[3] The subject of this action is the Secretary's decision to issue a permit. However, the Federation argues that the subject is the propriety of the exercise of enforcement discretion. Federation Brief in Support of Petition for Writ of Certiorari at 4-6. In a similar vein, the Secretary makes the startling assertion that permits authorize takings, not "fishing operations per se," and that the permit at issue here "does not authorize the Federation's fishing operations. It merely allows a specified number of incidental takings of one type of marine mammal (Dall's porpoise) in the event that the Federation engages in those fishing operations." Petition for Writ of Certiorari at 19. Among its other defects, the Federation's argument ignores the fact that the purpose of imposing civil penalties is to compel changes in conduct so that the conduct will stop producing unlawful results. However, as Captain Ogiwara and Dr. Jones testified, other than by not being set, there is no way catcherboat gillnets can avoid taking marine mammals in violation of the MMPA. The Secretary's argument is similarly defective. His own regulation requires each catcherboat to have a certificate of inclusion "aboard the vessel while it is engaged in fishing operations." 50 C.F.R. § 216.24(c)(3) (1987). But catcherboats may not be issued certificates until the Federation is issued a permit. Since the Secretary has been enjoined from issuing the Federation a permit and catcherboats have not been issued certificates of inclusion, during the 1988 season the catcherboats did not set gillnets inside the FCZ.

its catcherboats allowed to set their nets, the unlawful entanglement and drowning of fur seals, sea lions, harbor porpoise, Pacific white-sided dolphin, killer whales and other marine mammals in violation of the moratorium is unavoidable.[4] A result the Secretary has a nondiscretionary duty to prevent. *See* 16 U.S.C. § 1377(a).

But the Secretary denies that he has the duty. According to the Secretary, Congress has granted him authority to exercise administrative discretion, based upon his situational assessment of the public interest, to permit or not permit Federation catcherboats to set gillnets that he knows will entangle and drown marine mammals in violation of the MMPA. As his petition makes the argument:

> We do not, of course, suggest that the Secretary lacks discretion to consider the effects of commercial fishing activities on one species in deciding whether to issue a permit for the incidental taking of another by those same fishing activities . . . The Secretary contends only that the MMPA does not *compel* his denial of a permit for the taking of one species whenever a permit cannot be issued for another species potentially affected. (emphasis in original)

Petition for Writ of Certiorari at 17-18 n. 9.

In support of his interpretation of congressional intent, the Secretary relies on Judge Starr's dissent below. *Id.* at 15-20. However, with all due respect to Judge Starr,

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[4] The district court found Captain Ogiwara's and Dr. Jones' testimony determinative. According to the court: "Other than not setting their nets at all, there is nothing the captains and crews of Federation catcherboats can do to avoid entangling and drowning marine mammals and sea birds while fishing for salmon." *Federation of Japan Salmon Fisheries Cooperative Ass'n, supra* at 42.

his analysis is flawed. Judge Starr concluded that Congress has not considered the precise question raised in this action. Therefore, an intent should be imputed to Congress to allow the Secretary to implement the MMPA in whatever manner advances whatever policy choice he deems appropriate. But Judge Starr reaches this result not by reading the MMPA, but by reasoning that "one must in conscience wonder whether a reasonable Congress would have desired the odd outcome of calling a complete halt to important fishing operations with clear foreign policy complications." *Kokechik, supra* at 803-04.

What Judge Starr forgets is that Congress may adopt policies judges consider unreasonable. Like the Secretary, judges have no authority to correct Congress's errors. Their job is to discern and enforce Congress's intent, not second-guess its judgment. As the majority of Judge Starr's panel correctly concluded: "If it is appropriate to grant foreign commercial fishermen some leeway to take marine mammals incidentally in carrying out their commercial fishing operations for salmon, it is for the Congress, not the Secretary to decide." *Id.* at 802.

Judge Starr's construction also produces a result opposite the result Congress enacted the MMPA to achieve.

The Federation's permit application requested permission to take 5,500 Dall's porpoise, 450 fur seals and 25 sea lions. The Secretary determined that taking Dall's porpoise would be lawful, but that entangling and drowning fur seals and sea lions would be unlawful.

But what if he had found the reverse? What if the Secretary had determined that taking 450 fur seals and 25 sea lions would be consistent with the MMPA, but that

entangling and drowning 5,500 Dall's porpoise would not? In such a situation, would "a reasonable Congress" grant the Secretary authority to issue the Federation a permit for seals and sea lions to enable catcherboats to obtain certificates of inclusion authorizing them to set gillnets he knows will unlawfully entangle and drown thousands of porpoise when the unlawful takings could be prevented by not issuing the permit?

If the only difference between the two situations is the number of mammals taken unlawfully, then, as the circuit court correctly noted, in 1981 Congress made a clear policy choice: as discussed below, it authorized the Secretary to permit fishermen to take small numbers of marine mammals without complying with § 104 of the MMPA, if the fishermen are citizens of the United States and the mammals taken are not members of depleted populations.

And in 1988 Congress amended the MMPA to exempt United States fishermen and foreign fishermen other than the Federation from compliance with the prohibition on taking depleted populations.

Finally, the Secretary asserts that Judge Starr's interpretation of the MMPA has the benefit of not differentiating between permitting catcherboats to set gillnets the Secretary knows at the outset will unlawfully entangle and drown marine mammals, and the situation in which a permit is validly issued but, after the fishing begins, the quota for a particular marine mammal population included in the permit is reached. *See* Petition for Writ of Certiorari at 20-21. However, the two situations are not the same. In the first case, unlawful takings are inevitable. In the second, unlawful takings are only inevitable if,

when the quota is reached, the permittee refuses to stop fishing.[5]

But no matter what the Secretary believes the proper policy, the decision is not his to make. Deciding the proper balance between the national interest in protecting marine mammals and the Federation's interest in killing them is a choice Congress reserved to itself. And speaking through the text of the MMPA, Congress has decided that Federation catcherboats should not be allowed to set gillnets that will unlawfully entangle and drown fur seals, sea lions and other marine mammals, even in small numbers.

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[5] Pursuant to § 104(b)(2)(D) of the MMPA, 16 U.S.C. § 1374(b)(2)(D), the Secretary may condition issuance of a permit on compliance with whatever terms he deems appropriate. In the situation in which a permit authorizes a fishing vessel to take several marine mammal species and the quota with respect to the taking of one of the species is reached, the Secretary can require the vessel to stop fishing. Indeed, the Secretary imposed exactly that requirement on the United States tuna fleet. Because no quota for eastern spinner dolphin, a depleted species, was included in its permit, if a tuna boat captain observed eastern spinner dolphin in a school of porpoise commingled with tuna, the Secretary prohibited him from setting his net. *See* 42 Fed. Reg. 22,575 (1977). In 1984 Congress did what the Secretary could not: it allocated the tuna fleet a quota of 2,750 eastern spinner dolphin to enable the fleet to continue fishing when tuna and eastern spinner dolphin are commingled. Pub. L. No. 98-364, § 201, 98 Stat. 440, 441 (codified at 16 U.S.C. § 1374(h)(2)(B)(iii)(III)) (1984).

2. Legislative History Is Consistent with the Circuit Court's Interpretation of the Intent of Congress.

Since the intent of Congress in the text of the MMPA is clear, as this Court has instructed, "that is the end of the matter." *Chevron, U.S.A., Inc. v. N.R.D.C., supra* at 842. However, to whatever extent it may be relevant, the legislative history is consistent with the plain meaning of the text, and, when read in proper context, none of the snippets the Secretary and the Federation cite as contrary authority are inconsistent with that conclusion. The report of the Committee on Merchant Marine and Fisheries, for example, describes the limited authority Congress intended the MMPA to delegate the Secretary to allow marine mammals to be taken in violation of the moratorium. In pertinent part, the report states:

> Before *any* marine mammal may be taken, the appropriate Secretary must *first* establish general limitations on the taking, and must issue a permit which would allow *that* taking. *In every case,* the burden is placed upon those seeking permits to show that the taking should be allowed and will not work to the disadvantage of the species or stock of animals involved. If that burden is not carried – and it is by no means a light burden – the permit may not be issued. The effect of this set of requirements is to insist that the management of the animals be carried out with the interests of the animals as the prime consideration. (emphasis added)

H.R. Rep. No. 707, 92d Cong., 1st Sess. 18 (1971).

And in situations, such as the case at bar, in which protecting marine mammals and exploiting them for economic gain conflict, the committee instructed the Secretary to implement the MMPA "for their [i.e., the mammals'] benefit and not for the benefit of commercial exploitation." *Id.* at 22.

3. Congress Has Twice Ratified the Circuit Court's Interpretation of the MMPA.

According to his petition, Congress has "implicitly endorsed the Secretary's reading" of the MMPA. Petition for Writ of Certiorari at 20. In support of this assertion, the Secretary cites the 1982 enactment of a three-year extension of the Federation's 1981 permit. Fisheries Amendments of 1982, Pub. L. No. 97-389, § 201, 96 Stat. 1950-51 (codified at 16 U.S.C. § 1034(b))(1982). Since he knew when he issued the permit that catcherboat gillnets would entangle and drown harbor porpoise, Pacific white-sided dolphin, killer whales and other marine mammals that were not included in the permit, the Secretary reasons that Congress must have had the same knowledge. And since it knew, Congress would not have extended the permit unless it thought the result consistent with the MMPA.

However, Congress had no such knowledge.

The moratorium on taking marine mammals and the terms and conditions pursuant to which the Secretary would be authorized to allow takings in specific cases were the subject of exhaustive hearings. *Marine Mammals: Hearings on H.R. 690, et al., before the Subcomm. on Fisheries and Wildlife of the House Comm. on Merchant Marine and Fisheries*, 92d Cong., 1st Sess. (1971). *Ocean Mammal Protection: Hearings on S. 685, et al., before the Subcomm. on Oceans and Atmosphere of the Senate Comm. on Commerce*, 92d Cong., 2d Sess., Parts I and II (1972). They were reviewed and approved by two committees, H.R. Rep. No. 707, 92d Cong., 1st Sess. (1971); S. Rep. No. 863, 92d Cong., 2d Sess. (1972), debated, 117 Cong. Rec. 44,947-61 (1971); 118 Cong. Rec. 7,683-716, 25,246-300, 25,422-40 (1972), and renegotiated in a conference committee, H.R. Conf. Rep. No. 1488, 92d Cong., 2d Sess. (1972).

In contrast, in 1982 the Federation's permit was extended without hearings, without consideration by the

committees that exercise oversight jurisdiction over the MMPA, and with no debate. Rather, in the waning moments of the 97th Congress, Senator Packwood arranged for the Commerce Committee to discharge H.R. 3942, a bill that had previously passed the House. He then persuaded the Senate to pass, without a scintilla of debate,[6] a substitute for the House text of H.R. 3942 that, for the first time, included § 201, the section extending the permit. 128 Cong. Rec. 29,920-25 (1982). When H.R. 3942 returned to the House, rather than requesting the appointment of a conference committee or asking that the bill be referred to the Subcommittee on Fisheries and Wildlife Conservation and the Environment for hearings on § 201, Representative Breaux, the sponsor of H.R. 3942, moved the House to accept the Senate version of his bill. *Id.* at 30,050-57.

To assert that § 201 embodies the 97th Congress's "implicit endorsement" in 1982 of the Secretary's 1981 decision to allow Federation catcherboats to entangle and drown harbor porpoise, Pacific white-sided dolphin, killer whales and other marine mammals in violation of the moratorium the 92d Congress mandated in 1972 contravenes the facts.

What the facts reveal is that Congress has twice ratified the circuit court's interpretation of the MMPA.

In 1981 Congress amended § 101(a) of the MMPA to deal squarely with the matter that is the subject of the instant dispute between the parties: the

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[6] Senator Packwood's floor statement explaining his substitute for H.R. 3942 is preceded by a dot or "bullet." A bullet identifies a statement published in the Congressional Record that was not spoken by the member on the floor. Senator Packwood's remarks were submitted to the Congressional Record in writing *after* the Senate passed H.R. 3942.

taking of small numbers of marine mammals during the course of commercial fishing operations. In 1981 Representative Breaux decided that requiring permits issued pursuant to § 104 of the MMPA to engage in commercial fishing and other activities that would result in the take of small numbers of marine mammals was expensive and administratively cumbersome. Consequently, when he introduced H.R. 4084, a package of MMPA amendments, Representative Breaux included an amendment that authorized the Secretary to issue permits for the take of small numbers of marine mammals without requiring permit applicants to comply with § 104.

The text of the Breaux amendment read as follows:

> Permits may be issued by the Secretary for the taking of small numbers of marine mammals of species or population stocks that are not depleted. Such permits, which shall not be subject to § 104, shall require the permittees to comply with such reporting requirements regarding the taking as are deemed necessary by the Secretary.

Section 2, H.R. 4084, 97th Cong., 1st Sess. (July 9, 1981).

Had the amendment been enacted into law as introduced, in the instant case the Secretary could have issued the Federation a permit pursuant to § 104 to take Dall's porpoise, and then, pursuant to the Breaux amendment, included fur seals, sea lions and other marine mammals.[7]

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[7] This result assumes that fur seals, sea lions and other marine mammals that entangle themselves and drown in catcherboat gillnets are not members of depleted populations. In fact, at least three populations are depleted. The Secretary has declared Pribilof Island fur seals depleted, 53 Fed. Reg.

(Continued on following page)

But the Subcommittee on Fisheries and Wildlife Conservation and the Environment opposed this result. Although the subcommittee agreed that the Secretary should be given authority to authorize fishermen to take small numbers of nondepleted marine mammals without obtaining a § 104 permit, it limited the opportunity to do so to fishermen who are "citizens of the United States." H.R. Rep. No. 228, 97th Cong., 1st Sess. 2 (1981). The members of the Committee on Merchant Marine and Fisheries, and later the House and Senate, agreed with this result and enacted the subcommittee's substitute for the Breaux amendment into law. Pub. L. No. 97-58, 95 Stat. 979, 980 (codified at 16 U.S.C. § 1371(a)(4)) (1981).

Consequently, unless the Secretary lawfully issues the Federation a permit pursuant to § 104 that, in addition to Dall's porpoise, authorizes the take of fur seals, sea lions and other marine mammals the Secretary knows will entangle themselves and drown in catcherboat gillnets, Congress has required the Secretary to enforce the moratorium by preventing the nets from being set.

(Continued from previous page)

17,888-99 (1988), and announced his intent to declare sea lions depleted, 53 Fed. Reg. 16,299-301 (1988). With respect to Commander Island fur seals, the Secretary has determined that:

> Historic data indicate that 4 of 21 rookeries on the Commander Islands are now occupied and that the pre-exploitation population may have exceeded 1 to 1.7 million fur seals. If so, and if, as the parties have agreed, 60 percent of the pre-exploitation population represents the lower bound of OSP, the current population is most certainly well below OSP [i.e., depleted] even if it is stable or increasing.

52 Fed. Reg. 19,878 (1987).

The circuit court found the Breaux amendment, as enacted, a determinative expression of congressional intent. According to the court:

> The Secretary has no authority, by regulation or any other action, to issue a permit that allows conduct prohibited by that Act [i.e., the MMPA]. Nonetheless, the Secretary chose to disregard these incidental takings [of marine mammals other than Dall's porpoise] as "negligible," an undefined and ambiguous standard at best. The MMPA, however, does not provide for a "negligible impact" exception to its permitting requirements where incidental takings are not merely a remote possibility but a certainty.
>
> As enacted, § 1371(a)(4) [i.e., the Breaux amendment] creates a narrow exception for incidental, not intentional, takings having a negligible impact on the species involved "by citizens of the United States while engaging in commercial fishing operations, ..." The Secretary is not authorized to extend this flexibility to the Japanese nor is he authorized to create a new undefined statutory exception under the heading of "negligible," which clearly has the effect of avoiding the strictures of the MMPA and congressional intent.

Kokechik, supra at 802.

Last and most definitively, on November 23, 1988, President Reagan signed the Marine Mammal Protection Act Amendments of 1988. Pub. L. No. 100-711, 102 Stat. 4755 (1988). The statute is important evidence that, as a matter of national policy, Congress has decided not to overturn the circuit court interpretation of the MMPA insofar as it applies to the Federation. *See Blau v. Lehman*, 368 U.S. 403, 412-13 (1962)(holding that Congress's refusal to amend a statute subsequent to a circuit court opinion interpreting its original intent is evidence that the circuit court interpretation was correct). *See also United States v. Bd. of Commrs. of Sheffield, Alabama*, 435 U.S. 110, 134 (1978) (holding that when, in amending a

statute, Congress voices approval of the statute's prior interpretation, Congress should be treated as having adopted the prior interpretation).[8]

Three months after the circuit court issued its opinion, the Subcommittee on Fisheries and Wildlife Conservation and the Environment held a hearing on H.R. 4189, a bill to reauthorize the MMPA, at which William Evans, Under Secretary of Commerce for Oceans and Atmosphere, testified as follows:

> The National Marine Fisheries Service (NMFS) has interpreted its authority under the MMPA to include discretion to issue permits for incidental taking if the populations covered by the permit are within OSP, without proving that all other species that might be taken are also within OSP. However, in a recent decision involving a permit allowing a take of Dall's porpoise incidental to the Japanese salmon fishery, the United States Court of Appeals rejected NMFS's interpretation. In a two to one decision, the court ruled that NMFS did not have the authority to issue a permit for Dall's porpoise since other marine mammals (such as the fur seal) which were not demonstrably at OSP also were likely to be taken.
>
> Unless this decision is overturned or Congress amends the Act, NOAA may not be able to renew the general permits to the U.S. domestic fishing industry

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[8] *Sheffield* involved the interpretation of the intent of Congress embodied in the Voting Rights Act of 1965. Pub. L. No. 89-110, 79 Stat. 437 (1965). Although the opinion speaks of the Voting Rights Act of 1975 having "re-enacted" the 1965 Act, the 1975 Act actually amended the 1965 Act. *See* Voting Rights Act of 1975, Pub. L. No. 94-73, 89 Stat. 400 (1975). The Marine Mammal Protection Act Amendments of 1988 bear the same relationship to the MMPA that the Voting Rights Act of 1975 bears to the Voting Rights Act of 1965.

> that expire at the end of 1988 because depleted species or species of unknown status might be taken.

Marine Mammal Protection Act Authorizations: Hearing on H.R. 4189 before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries, 100th Cong., 2d Sess. 216 (1988)(statement of William Evans)[hereinafter House Hearing].

Testifying on the Federation's behalf, Takenobu Takahashi, an official of the Japan Fisheries Association (JFA), was even more forthright. According to Mr. Takahashi:

> The JFA strongly urges the United States Congress, should the *Kokechik* decision not be judicially reversed, to amend the MMPA so as to allow incidental take of an insignificant number of marine mammals from species that have not been included in permits issued under the MMPA in the past, without discrimination between foreign fisheries and U.S. domestic fisheries.

Id. at 265 (statement of Takenobu Takahashi).

After considering his request, the subcommittee met Secretary Evans halfway: in the tradition of the Breaux amendment, it adopted an amendment that adds a new § 114 to the MMPA. The section exempts United States fishermen and foreign groundfish fishermen from compliance with the circuit court's interpretation of the MMPA insofar as it applies to the take of depleted species, but purposely leaves the holding intact insofar as it applies to the Federation. As the Committee on Merchant Marine and Fisheries explained the decision:

> Subsection (a) specifies that the new § 114 will take effect immediately on the date of enactment of this Act and will remain in effect until October 1, 1993. During that time period, this section, rather than

> §§ 101, 103, and 104 of the MMPA, shall govern the incidental taking of marine mammals by commercial fishermen other than tuna fishermen. The subsection also provides that this interim regime will be available only to persons using vessels of the United States and vessels which have valid fishing permits issued under § 204(b) of the Magnuson Fishery Conservation and Management Act. By limiting the exception in this way, the Committee intends that the Japanese salmon gillnet fleet which has been precluded from operation in the U.S. Exclusive Economic Zone by a decision of the U.S. Court of Appeals in *Kokechik Fishermen's Association v. Secretary of Commerce* will not have the provisions of § 114 available to it. The Committee does not intend § 114 of (sic) disturb the holding in that case as it applies to the Japanese salmon gillnet fleet.

H.R. Rep. No. 970, 100th Cong., 2d Sess. 21 (1988).

The House agreed with the committee's policy choice and passed the Marine Mammal Protection Act Amendments of 1988 by unanimous vote. 134 Cong. Rec. H8237-46 (daily ed. September 26, 1988).

In the Senate, Secretary Evans and Mr. Takahashi presented the same testimony they presented in the House of Representatives. *Hearing on Marine Mammal Protection Act Reauthorization before the National Ocean Policy Study of the Senate Comm. on Commerce, Science and Transportation*, 100th Cong., 2d Sess. 193, 275 (1988)(statements of William Evans and Takenobu Takahashi). However, after considering the matter, the Committee on Commerce, Science and Transportation adopted the House's new § 114. S. Rep. No. 592, 100th Cong., 2d Sess. 3-5, 15-23 (1988). The Senate agreed with the committee's decision and passed its version of the House bill by unanimous vote. 134 Cong. Rec. S16,336-46 (daily ed. October 14, 1988).

Although the Secretary and Judge Starr may question its wisdom, Congress has decided not to relieve the Federation of its obligation to comply with the MMPA as the Act has been construed by the circuit court. Having done so, the doctrine of separation of powers requires that Congress's policy choice not be disturbed.

4. The Secretary's Policy Arguments Are Not Meritorious.

In addition to his statutory construction argument, the Secretary makes three policy arguments. According to the Secretary, implementation of the circuit court opinion "would be likely to have a devastating effect on this nation's fishing industry as well as upon foreign nationals who seek to fish in waters subject to the jurisdiction of the United States," may prompt GOJ to withdraw from the INPFC in which case "Japanese interception [outside the FCZ] of salmon of United States origin could dramatically increase, leading to severe losses for domestic salmon fishermen," and "may compromise ongoing efforts to implement a comprehensive fisheries agreement with the Soviet Union." Petition for Writ of Certiorari at 22-24.

None of the Secretary's arguments are meritorious.

With respect to the effect on domestic fishermen and foreign nationals other than the Federation, as described above, after considering the matter, Congress added a new § 114 to the MMPA that grants the Secretary authority to exempt United States fishermen and foreign nationals fishing with permits issued pursuant to § 204(b) of the MFCMA, 16 U.S.C. § 1824(b), from compliance with the circuit court opinion insofar as it applies to the take of depleted species. As a result, as a matter of congressional policy, Federation members are now the *only* fishermen, foreign or domestic, who may not fish if it is likely that their nets will entangle and drown fur

seals, sea lions and other marine mammals that are members of depleted populations.

With respect to his theory that, unless the circuit court opinion is reversed, GOJ will withdraw from the INPFC, the Secretary expressed the same concern to Congress. In his testimony before the Subcommittee on Fisheries and Wildlife Conservation and the Environment, Secretary Evans told the subcommittee that:

> Although we are seeking reversal of the Court ruling, the Japanese salmon fishery may not be able to operate this summer in the U.S. EEZ as contemplated by the International North Pacific Fisheries Convention (INPFC). As a result, Japan may withdraw from, or seek to renegotiate the INPFC. This would allow them to fish in areas where the take of North American origin salmon and marine mammals would be higher than when Japan fishes inside the U.S. EEZ and targets Asian stocks of salmon.

House Hearing at 224.

After considering Secretary Evans' views, the subcommittee, and later Congress, rejected them. For good reason. First, GOJ must give a year's notice prior to withdrawing from the INPFC.[9] To date, it has not done

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[9] In pertinent part, article XII of the INPFC states:

> This Convention shall continue in force until one year from the day on which a Contracting Party shall give notice to the other Contracting Parties of an intention of terminating the Convention, whereupon it shall terminate as to all Contracting Parties.

30 U.S.T. at 1110.

so.[10] And second, should GOJ withdraw, the Federation is not free to fish the North Pacific Ocean with abandon. As discussed above, the Soviet Union closely regulates the Federation salmon fishery. The Soviet Union has been reducing the Federation's catch quotas, and recently announced its intent to compel GOJ to end the Japanese high seas salmon fishery in the North Pacific Ocean by 1992.

Finally, with respect to his assertion that the circuit court opinion "may compromise ongoing efforts to implement a comprehensive fisheries agreement with the Soviet Union," although afforded an opportunity to do so, the Secretary did not express this concern to Congress. The reason he expresses it here is difficult to discern.

Last May the Secretary of State[11] concluded negotiations with the Soviet Union on a comprehensive fisheries agreement. Agreement Between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on Mutual Fisheries

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[10] When the argument was raised below, the district court held that the possibility that GOJ would withdraw from the INPFC was "speculative." *Federation of Japan Salmon Fisheries Cooperative Ass'n, supra* at 48. The court's assessment proved correct. On November 1 – 2 and 4, 1988, the INPFC held its annual meeting in Tokyo, Japan. GOJ did not withdraw from the INPFC.

[11] Interestingly, the Solicitor General identifies the Department of Commerce, rather than the Department of State, as the source of concern about the effect the circuit court opinion may have on the United States' relationship with the Soviet Union. Petition for Writ of Certiorari at 24.

Relations, May 31, 1988, United States-Soviet Union.[12] The agreement authorizes United States nationals to fish inside the Soviet FCZ and vice versa. With respect to marine mammals, article VI of the agreement provides:

> Each Party shall, consistent with its national law, take appropriate measures to ensure that its nationals and vessels refrain from harassing, hunting, capturing or killing any marine mammal within the zone of the other Party, or attempting such actions, except as may be provided for by an international agreement which is in force for both Parties, or in accordance with specific authorization and controls established by the Party in whose zone such actions occur.

The agreement was negotiated after the circuit court opinion was issued, and Kokechik has actual knowledge that the Soviet Union was aware of the opinion. Consequently, it is reasonable to assume that, with respect to fishing by Soviet nationals inside the FCZ, the Soviet Union understood and agreed that the phrase "specific authorization and controls established by the Party in whose zone such actions occur" refers to the MMPA as interpreted by the circuit court. Assuming that to be the case, there is no basis for the Secretary's concern.

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[12] The agreement was subsequently approved by Congress. Pub. L. No. 100-629, 102 Stat. 3286 (1988). *See* H.R. Rep. No. 968, 100th Cong., 2d Sess. 7-8 (1988).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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